

# The Corporate Transformation of the Courts: Towards A Judicial Board of Executive Directors

TIN BUNJEVAC\*

## ABSTRACT

The article seeks to advance the policy debate about court governance by reference to recent developments in Australia and other countries. It is argued that a corporate-style management board should be responsible for the judicial and administrative operations of the courts, with administrative judges and the CEO acting on the board as executive directors. It is contended that such an arrangement would be capable of achieving greater structural separation between ‘ownership’ and ‘management’ in the courts, which is regarded as an essential postulate of modern corporate law, because it promotes more expert and efficient management of large organisations. The paper also seeks to resolve the inherent conceptual difficulties involved in applying the corporate law theory to the courts, by arguing that the so-called ‘stewardship’ theory of corporate governance is capable of reconciling the key principles of modern corporate board design with the unique institutional character of the judicial organization.

## TABLE OF CONTENTS

THE CORPORATE TRANSFORMATION OF THE COURTS: TOWARDS A JUDICIAL BOARD OF EXECUTIVE DIRECTORS .....	1
INTRODUCTION .....	1
I. OVERVIEW OF THE COURT GOVERNANCE SYSTEMS IN AUSTRALIA	3
A. <i>Advantages and disadvantages of the federal courts vertical model</i>	4
B. <i>The collegiate governance model in Victoria ...</i>	6
II. CORPORATE TRANSFORMATION OF THE JUDICIARY IN OTHER COUNTRIES	8
III. CORPORATE GOVERNANCE THEORY AND THE COURTS ..	11
A. <i>The Agency theory of corporate governance and the courts</i>	13
B. <i>The Stewardship theory of corporate governance and the courts</i>	14
IV. BOARD OF EXECUTIVE JUDGES IN THE COURTS.....	15
A. <i>Early precursors: Ninth Circuit Court of Appeal and Queensland Courts.....</i>	16
B. <i>The Court Management Board in the Netherlands</i>	17
CONCLUSION .....	20

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\* The author is a lecturer at Victoria Law School, Melbourne, Australia.

## INTRODUCTION

Good corporate governance lies at the heart of all successful organisations. In the private sector, it has long been recognised that effective corporate governance can positively influence the way in which companies seek to achieve their objectives, monitor risk and optimise performance.<sup>1</sup> Over the last 20 years, successive governments in Australia and other countries have recognised the benefits of good corporate governance by actively promoting and implementing best-practice governance standards in government-owned corporations and areas of the public service.<sup>2</sup>

In contrast, the corporate transformation of the third arm of government – the courts – has been much slower and more sporadic, particularly outside the USA, due to a range of constitutional, cultural, organisational and procedural impediment.<sup>3</sup> It is also well-documented in the literature that judges are resistant to organisational change and that they often take a sceptical view of the management solutions that have been developed in the commercial world. As recently as 2006, the Chief Justice of New South Wales (NSW) forcefully argued that management evaluation frameworks for the courts belonged to the ‘autistic school of management.’<sup>4</sup>

Nevertheless, in the last 10 years, a consensus developed, both in Australia and internationally, that the traditional management arrangements in the courts have had a negative impact on the strategic long-term planning of court operations and overall performance. A landmark comparative study of the civil litigation systems of NSW and Germany revealed that the German courts were ‘light years ahead’<sup>5</sup> in terms of work organisation, procedure, litigation costs, timeliness, access to justice and client satisfaction.<sup>6</sup> An influential management study commissioned by the Australasian Institute for Judicial Administration found that a vast majority of the Australian state courts operated an ineffective organisational framework that was considered

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<sup>1</sup> Australian Securities Exchange Corporate Governance Council, *Asx Corporate Governance Principles and Recommendations* (ASX, 3rd ed, 2014), 3.

<sup>2</sup> See for example, the Victorian Public Sector Commission’s Board guidelines, at <<http://vpssc.vic.gov.au/html-resources/welcome-to-the-board/>> (viewed 25 February 2016); see generally also John Uhrig, ‘Review of the Corporate Governance of Statutory Authorities and Office Holders’ (Commonwealth of Australia, 2003).

<sup>3</sup> See generally Graham Gee et al, *The Politics of Judicial Independence in the UK’s Changing Constitution* (Cambridge University Press, 2015), Ch 10.

<sup>4</sup> Spiegelman J, ‘Measuring Court Performance Address’ (Paper presented at the 24th AIJA Conference, Adelaide, South Australia, 15-17 September 2006).

<sup>5</sup> Richard Ackland, ‘We Should Look to Germany for Justice’, *The Age* (Melbourne), 1 October 2010 <<http://www.theage.com.au/it-pro/we-should-look-to-germany-for-justice-20100930-15zcz.html>>. <<http://www.theage.com.au/it-pro/we-should-look-to-germany-for-justice-20100930-15zcz.html>> (viewed 25 February 2016).

<sup>6</sup> A. Marfording and A. Eyland, ‘Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany’ (UNSW Law Research Paper No. 2010-28, 15 July 2010).

to be outdated in the management literature.<sup>7</sup> In particular, the study found that there were two separate and disjointed management systems operating inside the courts, whereby judges were responsible for the dispensation of justice, while court administrators were separately responsible for the courts' operational management, on behalf of the Department of Justice. The main problem with this arrangement was that the judges had assumed the responsibility for improving court performance, while having insufficient authority over court operations.<sup>8</sup>

Around the same time, two international studies in the EU and Canada pointed to the possibility that the problems of organisational misalignment would likely persist even where the responsibility for court administration is transferred from the executive government to an independent courts administration authority.<sup>9</sup> One of the reasons for this finding was that judges were not sufficiently involved in the strategic planning of court operations due to ongoing reliance on the central authority that replaced the executive government.<sup>10</sup> To address this issue, the EU study suggested that an integrated management board inside each individual court might be better-placed to coordinate the judicial and administrative operations and transform the courts from 'organisations of professionals' into 'professional organisations.'<sup>11</sup>

The Victorian County and Supreme Courts have recently established non-statutory internal management boards in each court with responsibility for court administration, although no information is publicly available about their structure, powers and functions. This paper seeks to advance the policy debate in this area by identifying a number of principles of good corporate governance that would be useful in considering the structure and powers of court management boards. The principal focus will be on the courts in Victoria, although the administrative principles would equally apply to other jurisdictions where the statutory responsibility for court administration is formally vested in large collegiate boards of judges or divided between the judiciary and a centralised courts administration authority.

It is argued that a single management board should be responsible for all of the judicial and administrative operations in each court, with judges and the court CEO acting on the board as executive directors. It is contended that such an arrangement would be capable of safeguarding the unique institutional character of the courts, while also achieving greater structural separation between 'ownership' and 'management', which is regarded as an essential postulate of modern corporate law, because it promotes more efficient and expert

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<sup>7</sup> J. Alford et al, *The Governance of Australia's Courts: A Managerial Perspective* (Australian Institute of Judicial Administration, 2004) .

<sup>8</sup> Ibid 86.

<sup>9</sup> Carl Baar et al, *Alternative Models of Court Administration* (Ottawa: Canadian Judicial Council, 2006), 102-3; Wim Voermans and Pim Albers, 'Councils for the Judiciary in Eu Countries' (CEPEJ, 2003) 37.

<sup>10</sup> Baar et al, above n 9: 102-3; Voermans and Albers, above n 9, 112.

<sup>11</sup> Voermans and Albers, above n 9: 101, referring to Voermans et al., Wim Voermans and Pim Albers, 'Geïntegreerde Rechtbanken: Het Vervolg, Evaluatierapport Herziening Rechtelijke Organisatie (Onderdeel II)' (1994), 90-1.

management of large organisations.<sup>12</sup> *A posteriori*, this paper seeks to resolve the inherent conceptual difficulties involved in applying the corporate law theory to the courts, by arguing that the so-called 'stewardship' theory of corporate governance is capable of reconciling the key principles of corporate board design with the unique institutional character of the judicial organisation.

The first part of this article provides an overview of the court governance systems in Australia and the problems associated with the existing frameworks of court administration. Part 2 identifies the principles underpinning the corporate transformation of the judiciaries in the USA, UK and the Netherlands, where the court administration frameworks are transparent and much more clearly defined. Part 3 seeks to reconcile the theory of modern corporate board design with the unique characteristics of court governance. It proposes a small board of executive judges that would functionally integrate the management and policy-making functions in a single administrative court authority, while also ensuring more effective collegiate decision-making on behalf of the court as a whole. The final Part seeks to anchor the proposed theoretical model in practice, by highlighting the emerging contours of the executive board model in the courts of the USA, Australia and the Netherlands.

#### I. OVERVIEW OF THE COURT GOVERNANCE SYSTEMS IN AUSTRALIA

Even a cursory look at the landscape of the Australian court system must distinguish between the federal and state courts, because there are vastly different governance arrangements in place between the courts and the executive government, and also among the courts themselves. In a majority of the states, the court operations, budgeting, administrative policy and infrastructure are managed by the executive government, while judges principally remain in charge of the judicial aspects of court administration, which include judicial management, case management, adjudication and procedure.<sup>13</sup> In some states, such as Queensland, the statutory authority over the judicial administrative arrangements is vested in the Chief Judges alone, while in others, such as Victoria, all judges exercise their administrative powers collectively through the so-called councils of judges.

In contrast, the Australian federal courts were granted full administrative independence from the executive government in the late 1970s and 1980s, because the federal government considered that there was 'little systemic incentive to efficiency' in the executive model and

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<sup>12</sup> Elizabeth J. Boros and John Duns, *Corporate Law* (Oxford University Press, 3rd ed, 2013) 90; Klaus Hopt and Patrick Leyens, 'Board Models in Europe – Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France and Italy' (2004) 1(2) *European Company & Financial Law Review* 135, 136. The authors note that since the establishment of the Dutch East India Company in 1602, the corporate law has tried to solve the problem of the separation of ownership and control; See also *Salomon v A Salomon & Co Ltd* [1896] UKHL 1.

<sup>13</sup> Supreme Court of Victoria, *Courts' Strategic Directions Project* (State of Victoria, 2004) 71.

also because of the concerns about its impact on judicial independence.<sup>14</sup> As a result, the full administrative authority over court operations in the High Court of Australia was vested in a collegiate board comprising all seven justices of that court, while the administration of the much larger federal courts was vested in the Chief Justices of those courts alone.<sup>15</sup>

In 2014, the government of Victoria decided to transfer its operational control over court administration to an independent statutory entity called Court Services Victoria (CSV), which was modelled on the South Australian Judicial Council.<sup>16</sup> The main function of CSV is to provide the shared administrative services and operational facilities to the courts under a judicial umbrella, but without substantially affecting the existing internal governance arrangements in the courts themselves.<sup>17</sup>

The brief outline of the existing models of court administration in Australia indicates that there are two basic systems of organisation of work in the courts. The first is a vertical system of governance, where the responsibility for both policy-making and administration is formally vested in the Chief Judges. This is the model that operates in the federal courts and, on the judicial side alone, in Queensland.<sup>18</sup> In contrast, a horizontal, collegiate approach to court governance is found in the High Court of Australia and most state jurisdictions, including Victoria.

#### A. Advantages and disadvantages of the federal courts vertical model

According to Church and Sallmann, the key advantage of vesting the sole operational authority in the Chief Justices in the federal courts is that administrative accountability and authority are vested in specific individuals, which means that responses to problems can be 'swift and consistent.'<sup>19</sup> This framework places clear lines of administrative accountability and responsibility in the Chief Justices, which is particularly important in the federal courts, because the Chief Justices

<sup>14</sup> Stephen Skehill, 'Comment on Court Governance' (1994) 4 *Journal of Judicial Administration* 29

<sup>15</sup> See generally Peter Sallmann and Tim Smith, 'Constitutionalism and Managerial Effectiveness: Revisiting Australian Courts' Governance' in *Australian Courts : Serving Democracy and Its Publics* (Australasian Institute of Judicial Administration, 2013) 265.

<sup>16</sup> *Court Services Victoria Act 2014* (Vic). Notably, the South Australian Judicial Council itself was modelled on the Judicial Conference of the USA.

<sup>17</sup> At the time of the writing, the Victorian County Court and the Supreme Court were considering the introduction of non-statutory court management boards, but these arrangements are subject to the existing statutory authority of the Councils of Judges. No public information is presently available about the proposed initiative.

<sup>18</sup> Under s. 15 of the *Federal Court of Australia Act 1976* (Cth), the Chief Justice is responsible for ensuring the orderly and expeditious discharge of the business of the court. By s. 18A of the Act, the Chief Justice is also responsible for managing the administrative affairs of the court. In Queensland, the executive government continues to manage the administrative side of court operations, but the Chief Justice is in charge of the judicial administrative policy.

<sup>19</sup> Thomas Church and Peter Sallmann, *Governing Australia's Courts* (Australian Institute of Judicial Administration, 1991) 68.

are also responsible for the financial and operational affairs of the courts.<sup>20</sup>

Notably, the Chief Justices' formal statutory powers have been further expanded in recent years to also include full responsibility for the administration of the intra-curial arrangements in the distribution and execution of the judicial business of those courts.<sup>21</sup> This point is best illustrated by section 15 of the *Federal Court of Australia Act 1976*, which gives the Chief Justice the responsibility to ensure the 'effective, orderly and expeditious' discharge of the business of the court, together with the corresponding powers to assign cases and caseloads to particular judges, and even to temporarily restrict judges to non-sitting duties. The Chief Justices are assisted in the exercise of their duties by the court CEOs, who are responsible for implementing high-level policy and may also act on behalf of the Chief Justice in the administrative affairs of the Courts.<sup>22</sup>

Critics of the federal court system of governance point to the fact that the sole organisational responsibility for both policy-making and management of the courts is formally vested in the one individual. According to Church and Sallmann, that arrangement has the potential to 'retard' the development of administrative capacity and involvement of other judicial officers of the court.<sup>23</sup> Furthermore, the assignment of the sole policy-making responsibility to the Chief Justices has been criticised from a traditional management perspective on the basis that it does not sufficiently separate 'management' from 'policy making' of the institution and therefore does not comply with modern corporate governance practices.<sup>24</sup> Alford *et al* illustrate this problem by discussing a hypothetical example of an incompetent, inefficient or even 'tyrannical' Chief Justice who is able to dominate the court's affairs in a manner contrary to the ideal of judicial independence.<sup>25</sup>

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<sup>20</sup> See Michael Black, 'The Federal Court of Australia: The First 30 Years—a Survey on the Occasion of Two Anniversaries' (2007) 31(3) *Melbourne University Law Review* 1017, Ch XII. See Peter Sallmann and Richard T Wright, *Going to Court: A Discussion Paper on Civil Justice in Victoria* (Victoria. Department of Justice, 2000) 10. Federal judges stress that "self-administration" is the golden key' to operational effectiveness and accountability.

<sup>21</sup> Section 15 of the *Federal Court Act 1976* (Cth).

<sup>22</sup> See, for example, s 38D of the *Family Law Act 1975* (Cth).

<sup>23</sup> Church and Sallmann, above n 19, 68. See also Justice RE McGarvie, 'The Foundations of Judicial Independence in a Modern Democracy' (1991) 1 *Journal of Judicial Administration* 24. Justice McGarvie highlights the risk of the development of an informal "kitchen cabinet." See also Edward C Gallas, Nesta M Gallas and Ernest Friesen Jr, *Managing the Courts* (Indianapolis, Bobbs-Merrill, 1971) 140.

<sup>24</sup> Ibid. See also Lou Hill, *Constitutional and Managerial Principles of Judicial Court Governance: Implementation in the State of Victoria* (LLM Thesis, The University of Melbourne, 1995) 82-83.

<sup>25</sup> See Alford *et al*, above n 7, 74. Reference is also made to Sir Garfield Barwick CJ's dominant role in the High Court of Australia, which led to the changes to the High Court's internal governance model. See Neil Andrews, 'Vinegar Free-Sir Garfield Barwick's Recipe for Judicial Salad' (1996) 3 *Canberra L. Rev.* 175, 189.

### B. The collegiate governance model in Victoria

The Chief Justices' administrative supremacy in the federal courts stands in sharp contrast to the traditional collegiate model of judicial court governance in Victoria, which is embodied in the statutory councils of judges in each of the court tiers.<sup>26</sup> The administrative authority of the councils was entrenched in the original legislation that established the Supreme Court in the 19<sup>th</sup> century, when only a handful of judges were appointed to the bench.<sup>27</sup> According to the Victorian Chief Justice Marilyn Warren, the original legislation had contemplated a Council of only four judges to be responsible for administering the Court in 1852. She contrasts this with the more recent situation, when there were almost 40 judicial officers on the Council of Judges in the Supreme Court alone.<sup>28</sup> The Chief Justice's comments suggest that the existing judicial administrative arrangements have become unwieldy, because, 'as courts and tribunals become larger, the traditional structures of internal management and leadership become more cumbersome and provide a poor fit.'<sup>29</sup>

One of the criticisms of the 'all justices' collegiate model is that it furthers administrative ambiguity. The European Council for the Efficiency of Justice (CEPEJ) points out that large collegiate assemblies of judges tend to promote weak and inefficient policy-making, because they are primarily aimed at reaching a consensus on all aspects of the judges' work in the courts.<sup>30</sup> This issue had been noted much earlier in the USA, where the Hruska Commission in 1973 examined the collegiate governance structures in the courts of California and concluded that any court governing organ with more than 15 members 'inevitably gives rise to serious problems of administration and of internal operation.'<sup>31</sup>

In Victoria, this problem is further compounded by the fact that, apart from the generic provisions in the courts legislation that establish the councils of judges,<sup>32</sup> there are few other provisions in the legislation itself that clarify the relationship between the judiciary and the administrative structures in the courts.<sup>33</sup> Unlike the Australian federal

<sup>26</sup> See s.28 of the *Supreme Court Act 1986*; s. 87 of the *County Court Act 1958*; s. 15 of the *Magistrates' Court Act 1989*.

<sup>27</sup> Civil Justice Committee, 'Report to the Honourable Attorney-General Concerning the Administration of Justice in Victoria' (1984) 341. The Committee also noted that the court staff had at first not been under the control of the executive government, even though some of them had been paid out of public funds.

<sup>28</sup> Marilyn Warren, 'State of the Victorian Judicature' (Paper presented at Banco Court, Supreme Court of Victoria, 22 May 2007) 36.

<sup>29</sup> Ibid 35.

<sup>30</sup> Voermans and Albers, 'Councils for the Judiciary in Eu Countries,' above n 9, 100-1.

<sup>31</sup> Thomas Church Jr, 'Administration of an Appellate Leviathan: Court Management in the Ninth Circuit Court of Appeals' in Arthur D Hellman (ed), *The Innovations of the Ninth Circuit and the Future of the Federal Courts* (Cornell University Press, 1990) 226, 229.

<sup>32</sup> See s 15 *Magistrates' Court Act 1989* (Vic); s 87 *County Court Act 1958* (Vic); s 28 *Supreme Court Act 1986* (Vic).

<sup>33</sup> There are notable exceptions. For example, sections 6 and 13 of the *Magistrates' Court Act 1989* confer on the Chief Magistrate the powers to assign duties to magistrates and to ensure their attendances in court. Similarly, there are provisions

courts legislation, which confers specific administrative powers on the Chief Justices and the CEOs, the Victorian legislation is practically silent on this issue. That does not mean that the Victorian courts have not developed any administrative arrangements. As former Supreme Court Justice Richard McGarvie pointed out more than 20 years ago, the courts have developed relatively sophisticated non-statutory internal administrative divisions, which were assigned to specific judges-in-charge.<sup>34</sup> Such arrangements were found to facilitate more efficient and functional delegation of work among judges, because they were characterised by a degree of administrative autonomy and judicial specialisation.<sup>35</sup> However, the internal divisional arrangements were insufficiently clear as they were not recorded in any court regulations or statute and therefore lacked the legal imprimatur of formal legal obligations. Furthermore, the judicial arrangements were designed for the executive system of governance, where judges primarily debated issues relevant to the legal procedure while court operations were being separately managed by the Department of Justice.

As a result of that legacy, there are today practically no provisions in the Victorian courts legislation that facilitate or clarify the functions and powers of the judges-in-charge of the internal divisions, either in relation to other judges, or in relation to the court administration as a whole. Neither the Chief Judges nor the divisional chief judges ('Principal Judges') in the County or the Supreme Courts have any formal legislative authority or management tools to administer their courts and divisions.<sup>36</sup> It is also unclear what formal or informal arrangements are available to the CEOs in the higher courts to coordinate their activities with the councils of judges, executive committees or divisions. The overall perception is one of disunity and a lack of coordination between the formal and informal administrative structures in the courts.

The recent transfer of responsibility for court administration from the executive government to Court Services Victoria (CSV) has not materially resolved these issues, because one of the key features of the reform was to retain the existing provisions in the courts legislation, ostensibly to ensure that each jurisdiction would continue to be administered autonomously.<sup>37</sup> In fact, the *Court Services Victoria Act*

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in each of the Courts Acts that make the chief judicial officers responsible for directing the professional development and training of other judicial officers (S 28A of the *Supreme Court Act 1986*; s 13B of the *Magistrates' Court Act 1989*; s 17AAA of the *County Court Act 1958*). In the Court of Appeal, the President is responsible for ensuring the 'orderly and expeditious exercise of the jurisdiction and powers of the Court of Appeal': S 16 of the *Supreme Court Act 1986*. In addition, the chief judicial officers of the County and Supreme Courts have certain controlling competences in relation to the business of the Associate Judges and Judicial Registrars. See e.g. s 17E and 109A of the *Supreme Court Act 1986*; s 17ABA of the *County Court Act 1958*.

<sup>34</sup> See generally, R McGarvie, 'Judicial Responsibility for the Operation of the Court System' (1989) 63(2) *Australian Law Journal* 79.

<sup>35</sup> *Ibid* 91-2.

<sup>36</sup> Warren, above n 28, 36.

<sup>37</sup> Supreme Court of Victoria, *Submission to the Productivity Commission, Access to Justice Arrangements* (Supreme Court of Victoria, 2014) 12.



has arguably created additional uncertainty about the internal administrative arrangements in the courts, because the individual court CEOs are now also the subject to central directions by the CEO of CSV, as well as the Chief Judges of their courts.<sup>38</sup>

In an attempt to resolve these issues, the Victorian County and Supreme Courts have recently established an internal management board to be responsible for court administration, although little information is publicly available about these initiatives. The following Part seeks to contextualize the developments in Victoria by analyzing the corporate transformation of the courts in the USA, the UK and the Netherlands, in order to identify key principles of good corporate governance that ought to be taken into account in considering the structure and powers of an integrated court management board.

## II. CORPORATE TRANSFORMATION OF THE JUDICIARY IN OTHER COUNTRIES

The process of modern corporate transformation of the judiciary can be traced back to Roscoe Pound's address to the annual convention of the American Bar Association in 1906.<sup>39</sup> It is worth recalling that two of the four 'causes of popular dissatisfaction with the administration of justice' that were identified by Pound were closely associated with the problems of court administration; namely, 'judicial organisation and procedure' and the 'environment of judicial administration.'<sup>40</sup> The establishment of the Conference of Circuit Judges and the Circuit Councils in 1922 heralded the birth of the 'American model'<sup>41</sup> of court administration, which was characterised by full judicial control of court operations, with administrators reporting directly to judges rather than the executive government.<sup>42</sup>

From the Victorian perspective, one of the most remarkable features of the American model was the desire to formalise the administrative structures and relationships within the judiciary in the form of highly transparent rules and regulations.<sup>43</sup> For example, as Wheeler pointed

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<sup>38</sup> Section 33 of the *Court Services Victoria Act 2014* (Vic). For a detailed examination of the *Court Services Victoria Act 2014* (Vic), see Tin Bunjevac, 'Court Services Victoria and the New Politics of Judicial Independence: A Critical Analysis of the Court Services Victoria Act 2014 (Vic) (2016) 41(2) *Monash University Law Review* (forthcoming).

<sup>39</sup> Roscoe Pound, 'The Causes of Popular Dissatisfaction with the Administration of Justice' (1906) 14 *American Lawyer* 445.

<sup>40</sup> *Ibid* 448-9.

<sup>41</sup> Perry S Miller and Carl Baar, *Judicial Administration in Canada* (Montreal, McGill, 1981) 63.

<sup>42</sup> Baar et al, above n 9, 61. In 1939 the Congress transferred the administrative control of the Federal Courts from the Department of Justice to the judiciary.

<sup>43</sup> See, generally, Russell R Wheeler, *Origins of the Elements of Federal Court Governance* (Federal Judicial Center, 1992). Examples of this practice can be found at all levels of the judicial organisation and across different states and federal Circuits. See, for example, National Center for State Courts, *Key Elements of an Effective Rule of Court on the Role of the Presiding Judge in the Trial Courts* (National Center for State Courts, 2006). See also the detailed Judicial Administration Rules of the Judicial Council of California at <<http://www.courts.ca.gov/cms/rules/index.cfm?title=ten>> For a critique of judicial

out, the Circuit Councils had been given formal statutory powers to ensure the ‘expeditious and efficient’ disposition of cases and to issue administrative ‘orders’ that individual judges had to comply with.<sup>44</sup> Secondly, the American court reformers also recognised the importance of preserving individual courts’ operational autonomy, leaving basic decisions about case processing, staff selection and management in most cases to the courts themselves.<sup>45</sup> This practice allowed individual jurisdictions and Circuits to develop innovative administrative rules and practices that were remarkably transparent and functional at the same time.<sup>46</sup>

Most importantly, for present purposes, there was recognition that certain management concepts drawn from the commercial world and the management theory could be readily adapted to the court environment. Over a period of several decades, the National Center for State Courts, the National Association for Court Management, the Federal Judicial Center and other bodies have developed an impressive array of policies and techniques that introduced some of the best practices from the commercial world to the unique organisational environment of the courts. Today this philosophy is reflected in a range of managerial approaches pioneered by the US courts that have entered the essential vocabulary of judges and court administrators throughout the world. It is no exaggeration to state that the concepts of weighted caseloads,<sup>47</sup> case-flow management,<sup>48</sup> total quality management<sup>49</sup> and, more recently, judicial governance principles<sup>50</sup> and organisational quality frameworks<sup>51</sup> have truly revolutionized the ‘art and practice’ of court administration in many countries, including Australia.<sup>52</sup> The Australian federal courts, for example, have successfully adopted the

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corporatisation see Wolf V Heydebrand and Carroll Seron, *Rationalizing Justice : The Political Economy of Federal District Courts* (State University of New York Press, 1990) 14.

<sup>44</sup> Wheeler, above n 43, 18-19; Church and Sallmann, above n 19, 73.

<sup>45</sup> Church and Sallmann, above n 19, 73.

<sup>46</sup> For example, s 6 of the *Omnibus Judgeship Act* of 1978 allowed courts of appeal with more than 15 judges to experiment with internal administrative units. The administrative innovations of the Ninth Circuit Court of Appeal, in particular, have been well-documented and studied around the world. See e.g. Church Jr, above n 31; See also McGarvie, above n 23: 30.

<sup>47</sup> V.E. Flango, B.J. Ostrom and National Center for State Courts, *Assessing the Need for Judges and Court Support Staff* (National Center for State Courts, 1996).

<sup>48</sup> D.C. Steelman et al, *Caseflow Management: The Heart of Court Management in the New Millennium* (National Center for State Courts, 2004).

<sup>49</sup> Alexander B Aikman, *Tqm Total Quality Management in the Courts : A Handbook for Judicial Policy Makers and Administrators* (National Center for State Courts, 1994).

<sup>50</sup> National Center for State Courts, *Principles for Judicial Administration* (NCSC, 2012); Christine Durham and Daniel Becker, *Perspectives on State Court Leadership: A Case for Court Governance Principles* (Harvard Kennedy School, 2010).

<sup>51</sup> National Center for State Courts, *Courttools: Trial Court Performance Measures* (National Center for State Courts, 2005).

<sup>52</sup> Alexander B Aikman, *The Art and Practice of Court Administration* (CRC Press, 2007).

individual docket system<sup>53</sup> and experimented with workload measurement systems for the judiciary,<sup>54</sup> which were largely inspired by the concepts and practices developed by the American courts.<sup>55</sup>

Outside the USA, a similar evolutionary process has been underway in England, following the introduction of the *Constitutional Reform Act 2005* (UK), where it appears that the English judiciary is following firmly in the footsteps of twentieth century American court reformers. A landmark study by leading English constitutional academics recently concluded that the English judiciary's 'shift away from a culture of individualism towards one of corporatism'<sup>56</sup> has significantly improved its accountability and enhanced its institutional capacity to protect judicial independence.<sup>57</sup> According to Gee *et al*, the constitutional reforms necessitated the creation of more formal relationships both within the judiciary and between the judiciary and the other branches of government.<sup>58</sup> This is reflected not only in the detailed procedures laid down in the Framework agreements that regulate the management of the courts, but also in the creation of a modern judicial bureaucracy, headed by the Judicial Executive Board, which now effectively operates as a 'form of judicial Cabinet'.<sup>59</sup>

In other EU countries, arguably the most comprehensive court system reforms have been introduced in the Netherlands, where the 'executive' system of court administration has been replaced by modern corporate board structures inside the courts themselves. A court management board now fully integrates the judicial and administrative functions of court administration under a single executive court authority, thus replacing two separate management systems that were previously in place in the courts.<sup>60</sup> According to Voermans and Albers, the system of integrated management, which is modelled on a small corporate board of executive directors, facilitates effective collegiate decision-making on the board, while also introducing a more hierarchical management style in the internal court divisions, focusing on the management aspects of the work of divisional chief judges.<sup>61</sup>

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<sup>53</sup> Caroline Sage et al, *Case Management Reform: A Study of the Federal Court's Individual Docket System* (Law and Justice Foundation of NSW, 2002) .

<sup>54</sup> Tony Landsell and Stephen O'Ryan, 'Benchmarking and Productivity for the Judiciary' (2000) 10(1) (July) *Journal of Judicial Administration* 25.

<sup>55</sup> Anthony North, 'My Court Car Is a Helicopter' (Paper presented at the Canadian Judicial Council Conference Inside the Administration of Justice: Toward a New Model of Court Administration, Victoria, British Columbia, 31 January 2007). Justice North points out that the Federal Court of Australia engaged Maureen Solomon, a leading US case management expert, to assist with the introduction of the individual docket system.

<sup>56</sup> Gee et al, above n 3, 126.

<sup>57</sup> Ibid 101 and 112. See generally also Kate Maleson, *The New Judiciary: The Effects of Expansion and Activism* (Ashgate, 1999).

<sup>58</sup> Gee et al, above n 3, 252-3.

<sup>59</sup> Ibid 253-4. See also Ch 6.

<sup>60</sup> Tin Bunjevac, 'Court Governance: The Challenge of Change' (2011) 20 *Journal of Judicial Administration* 201, 221.

<sup>61</sup> Voermans and Albers, 'Geïntegreerde Rechtbanken', above n 11, 90-1.

These developments suggest that the process of modern institutional transformation of the judiciary is evolving from mere adaptation of good management practices imposed upon existing court structures, towards the establishment of new policy-making and management frameworks in the courts that are also modelled on their modern corporate equivalents. As Voermans and Albers point out, new governance arrangements are required in order to give the courts more internal possibilities to improve their operations.<sup>62</sup> This is because the operational and interpersonal divide between the judicial and non-judicial officers in the traditional model had substantially reduced the possibilities for greater workflow integration and the creation of deeper patterns of work delegation between judges and professional court staff.<sup>63</sup> In their view, these problems can best be resolved by the introduction of a central management board, in which the administrative judges, acting as the 'executives of courts,' would be given greater 'responsibility and powers in financial and personnel matters.'<sup>64</sup>

The following Part explores these issues in more detail, by seeking to reconcile the corporate law theory of board design with the unique institutional characteristics of the courts. It is argued that a small board of management, modelled on a corporate board of executive directors, should be responsible for the judicial and administrative operations of the courts, with judges acting on the board as executive directors together with the court CEO. It is contended that such an arrangement would be capable of safeguarding the unique institutional character of the courts, while also achieving greater structural separation between 'ownership' and 'management' of the organisation, which is regarded as an essential postulate of modern corporate law.

### III. CORPORATE GOVERNANCE THEORY AND THE COURTS

The modern corporate law principles of board design have occasionally influenced the thinking of court reformers in the USA, Australia and other countries. As early as the 1970s, Friesen *et al* proposed a small board of judges that would sit as a policy board and function as an 'intervening element between the judicial environment and the court organisation.'<sup>65</sup> In their view, the policy-making function of the Board was to provide a 'structural pattern for judicial administration concurrently with high quality court management.'<sup>66</sup> In Australia, a similar view was espoused by Hill, who analysed the internal governance structures in the Victorian courts and concluded that the division of administrative responsibilities inside the courts was

<sup>62</sup> Voermans and Albers, 'Councils for the Judiciary in Eu Countries', above n 9, 101.

<sup>63</sup> See Voermans and Albers, 'Geintegreerde Rechtbanken', above n 11, 70–7, 90–2.

<sup>64</sup> Wim Voermans, 'Councils for the Judiciary in Europe: Trends and Models' in *The Spanish Constitution in the European Constitutional Context* (2003) 2133; Voermans and Albers, 'Councils for the Judiciary in Eu Countries', above n 11, 100–1.

<sup>65</sup> Gallas, Gallas and Friesen Jr, above n 23, 134 and 138.

<sup>66</sup> Ibid 135. The authors refer to the seminal work of Peter F. Drucker, *The Practice of Management* (Harper & Row, 1954).

insufficiently clear and that the ‘opportunity for judges to exercise meaningful control over court administration [w]as also slight.’<sup>67</sup> Hill’s principal contention was that the courts should draw upon the corporate governance business model, ‘one which separates management from equity holders and from final policy determination.’<sup>68</sup> According to this view, the judges sitting on the councils of judges can only be characterised as ‘equity holders,’ because they are not in an effective position to act as a true policy-making organ, such as a board of directors in a corporation.<sup>69</sup> This characterisation is significant, because it supports the proposition that the large collegiate assemblies of judges should not have a direct role in the management of the courts, because they tend to promote weak and inefficient decision-making that is primarily aimed at reaching a consensus among judges on all aspects of their work in the courts.<sup>70</sup>

Hill’s thesis was strongly influenced by established corporate governance principles, which require greater *structural separation* of the function of the board of directors from that of the shareholders’ meeting in a corporation. This corporate law device is designed primarily to facilitate ‘more expert and efficient management of the corporation,’<sup>71</sup> although it also serves to attract capital and allow shareholders to exercise indirect control over corporate management through the supervisory function of the board. In practical terms, this means that the dispersed corporate shareholders have very limited input in the board’s policy deliberations, apart from being entitled to participate and vote in annual general meetings and to take a ‘positive interest’ in the composition and performance of the board.<sup>72</sup> Most importantly, the corporate board is considered to be an *independent* organ of the company, rather than merely being an agent of the shareholders’ meeting.<sup>73</sup>

In operational terms, the board is mainly concerned with the strategic policy, while corporate managers have the authority to deal with matters of operational performance of the company.<sup>i</sup> The policy rationale behind these principles is to avoid a situation where the Board is tempted to step into the operational side of the company’s business, while also preventing the company management or the CEO from

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<sup>67</sup> Hill, above n 24, 84.

<sup>68</sup> Ibid 83-4.

<sup>69</sup> Ibid 85.

<sup>70</sup> Voermans and Albers, ‘Councils for the Judiciary in Eu Countries’, above n 9, 100-1.

<sup>71</sup> Boros and Duns, above n 12, 90.

<sup>72</sup> Hill, above n 24, 85. See also the *Corporations Act 2001* (Cth), which requires that certain powers of the corporation must be exercised by the general meeting of members, such as voting on the composition of the board (s203D), changes to company constitution (s136) and changes to company capital structure (s254H).

<sup>73</sup> *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113. See also s 198A of the *Corporations Act*, which provides that ‘the business of a company is to be managed by or under the direction of the directors.’ In practice, the Board may confer its powers on a managing director (s198C) or delegate to a committee of directors (s198D). The ASX Listing Rules may also require some specific matters to be approved by the company general meeting; See ASX Listing Rules 7.1, 10.1, 10.11, 11.1, 11.2.

usurping the policy-making function that properly rests with the board elected by the shareholders.<sup>74</sup>

#### A. The Agency theory of corporate governance and the courts

Although the corporate board model is generally regarded as being effective in facilitating more expert and efficient management of the corporation, until more recently the corporate governance theory could not properly reconcile the underlying organisational dynamics of commercial enterprises with the unique internal demands and characteristics of certain types of organisations, such as the courts. Namely, the corporate law has predominantly viewed the interests and stakeholder relationships within organisations through the prism of the so-called 'agency theory' of corporate governance. According to this theory, corporate governance seeks to resolve an inherent conflict of interests between the corporate owners, the board and management, with the view to achieving profit maximisation through commercial activity.<sup>75</sup> As Kraakman and Hansmann point out, the problem lies in ensuring that the board and management ('agents') remain responsive to the owners' interests ('principals'), rather than their own personal interests.<sup>76</sup> The agency theory seeks to resolve these conflicts by introducing a range of *constraining devices*, such as executive compensation schemes, regulatory requirements and internal board structures, which are specifically designed to better align the inherently conflicting interests of the agents and the principals.<sup>77</sup> In theory, that task is best achieved by fully separating the functions of the board and management, and by having a majority of independent non-executive directors on the board, in order to reduce the management's potential influence on the board of directors.<sup>78</sup>

Admittedly, it is almost impossible to apply the agency theory's organisational prescriptions to the unique internal characteristics of the judicial organisation. The administration of justice in the courts is quintessentially a non-commercial undertaking, because the judicial organisation is centred around the utilitarian and altruistic goals of fairness, impartiality, justice and equality before the law. As Hill points out, a judge's interest in the internal affairs of the court is much more immediate, long-term and personal than the shareholders' interest in

<sup>74</sup> Thomas Clark, *International Corporate Governance: A Comparative Approach* (Routledge, 2007) 36-38.

<sup>75</sup> See generally, Hansmann H and Kraakman R, 'Agency Problems and Legal Strategies' in Kraakman R et al (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 2004), 21-31.

<sup>76</sup> Ibid 22.

<sup>77</sup> Ibid 23-7; see also Lex Donaldson and James H Davis, 'Stewardship Theory or Agency Theory: Ceo Governance and Shareholder Returns' (1991) 16(1) *Australian Journal of management* 49, 51.

<sup>78</sup> James H. Davis, F. David Schoorman and Lex Donaldson, 'Toward a Stewardship Theory of Management' (1997) 22(1) *The Academy of Management Review* 20, 23. See also Australian Securities Exchange Corporate Governance Council, above n 1, 16. The ASX Recommendation 2.1 recommends that 'a majority of the board should be independent directors'.

the internal affairs of the company.<sup>79</sup> Secondly, shareholders typically do not participate in company management, whereas judges' input in court operations is both essential and direct. Thirdly, shareholders are usually not employed by their company, whereas judges act as policy-makers, administrators, as well as 'employees' of the courts - in the sense that they are ultimately responsible for the primary process of the organisation. As a result, it can be said that judges, as 'tenured shareholders,' have a much more tangible interest in the management of their courts than do ordinary shareholders in the management of their company. Moreover, the interests of the judicial 'principals' and management appear to be fundamentally aligned, because there is no inherent conflict of interest between the principals and agents, which is a defining characteristic of most commercial enterprises.

#### B. The Stewardship theory of corporate governance and the courts

Since the late 1980s and early 1990s, a complementary theory of corporate governance with roots in psychology and sociology has been developed in order to explain the situations where the organisational interests of the principals and agents appear to be more aligned. The so-called 'Stewardship theory' of corporate governance takes a decidedly positive view of the personal attributes of, and interactions between, the shareholders, the board members and management in specific organisational environments. According to a seminal paper by Davis and Donaldson, the organisational actors in the stewardship model feel personally motivated to act as the corporate stewards, by seeking to achieve non-financial, 'intrinsic satisfaction' and by acting responsibly and in line with the broader organisational objectives of the entity.<sup>80</sup> In a follow-up study Davies *et al* specifically identified loosely coupled, heterogeneous organisations (such as the courts<sup>81</sup>), as ones where the corporate stewards were likely to be 'motivated to make decisions that are in the best interests of the group.'<sup>82</sup> The authors drew upon a wealth of organisational literature to identify the typical profile of a corporate steward as someone who self-identifies with the organisation and is motivated by non-financial, 'higher order' needs.<sup>83</sup> Unlike the corporate agent, who favours 'control-oriented mechanisms' and 'high-power distance culture', the steward has a strong preference for organisational structures and mechanisms that are 'involvement-oriented,' 'trust-based' and foster 'value-commitment.'<sup>84</sup>

Based on the above, it is reasonable to hypothesise that judges in charge of the court operations can be characterised as the judicial 'stewards' under the stewardship theory of corporate governance. This is because the courts' internal organisational dynamics are very much

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<sup>79</sup> Hill, above n 24, 86.

<sup>80</sup> Donaldson and Davis, above n 77: 51.

<sup>81</sup> Mary Campbell McQueen, *Governance: The Final Frontier, Perspectives on State Court Leadership* (NCSC, 2013) .

<sup>82</sup> Davis, Schoorman and Donaldson, above n 78, 25.

<sup>83</sup> Ibid 29-30.

<sup>84</sup> Ibid 30-1.

centred upon the intrinsic values of justice and the rule of law, while the stewards' personal motivations are not profit-related, but rather are informed by strong value-commitments, trust-based relationships and peer-respect. Above all, the intrinsic motivations of the judicial stewards appear to be fundamentally aligned with those of the judicial principals sitting on the councils of judges.

Importantly, the stewardship theory also has a number of practical prescriptions in areas such as the board design, which stem from its more positive interpretation of the organisational separation between ownership and control. According to Maassen, stewardship theorists ostensibly agree with the agency-theory notion that the separation between ownership and control is an effective and efficient means of managing large organisations.<sup>85</sup> However, unlike the agency theory, which sees goal-conflict as an inevitable consequence of the diverging interests of the corporate owners and corporate managers, the stewardship theory's preference for goal-alignment holds that the principals can expect much better results where the internal organisational structure facilitates greater control by those in charge of the management.<sup>86</sup> Therefore, the stewardship theory has a strong preference for an internal governance architecture that better integrates policy-making and management, such as a small board of executive directors,<sup>87</sup> because the corporate stewards will thereby be more likely to be empowered to influence the strategic direction of the corporation.<sup>88</sup>

#### IV. BOARD OF EXECUTIVE JUDGES IN THE COURTS

As the analysis of the Australian models of court governance in Part 1 demonstrates, the policy debate about the internal governance architecture of the courts is not purely academic in nature, but rather involves issues of great practical significance for the courts in most Australian jurisdictions. We have seen that in the federal courts there was no effective separation between ownership, management and control, because the policy-making and management functions are formally vested in the Chief Justices alone (although, in practice, their policy-making function tends to be exercised in a more collegiate

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<sup>85</sup> G.F. Maassen, *An International Comparison of Corporate Governance Models* (SpencerStuart, 1999) 63-4.

<sup>86</sup> Melinda Muth and Lex Donaldson, 'Stewardship Theory and Board Structure: A Contingency Approach' (1998) 6(1) *Corporate Governance: An International Review* 5, 6 and 10.

<sup>87</sup> *Ibid.*

<sup>88</sup> Maassen, above n 85, 65. Interestingly, the stewardship theory also sees benefits in integrating the roles of the President of the board with that of the CEO, an arrangement that is not viewed favourably by the Agency theory, due to concerns about the management's dominance over the Board. See eg Australian Securities Exchange Corporate Governance Council, above n 1, 18. The ASX Recommendation 2.5 states that the 'chair of the board of a listed entity should be an independent director and, in particular, should not be the same person as the CEO of the entity.'



manner).<sup>89</sup> The opposite problem was identified in the Victorian courts, where the large councils of judges were unable to effectively perform the policy-making function of a board of directors, while the court management function was awkwardly divided between the councils and their judicial committees, court divisions and the rest of the court administration headed by the court CEO. Arguably, therefore, this organisational architecture also suffers from a lack of clarity regarding the internal division of responsibilities between the existing administrative structures and officers-in-charge.<sup>90</sup>

The analysis of the stewardship theory suggests that a small board of executive judges could potentially resolve some of these problems, because it would integrate the management and policy-making functions in the one administrative organ, while also ensuring more effective collegiate decision-making on behalf of the court as a whole. This following discussion seeks to anchor the theoretical model in practice, by analysing the emerging contours of the proposed judicial board model in the courts of the USA, Australia and the Netherlands.

#### A. Early precursors: Ninth Circuit Court of Appeal and Queensland Courts

According to Church, one of the pioneers in this area was the Ninth Circuit Court of Appeal under the leadership of Chief Judge Browning. One of the court's early innovations was the appointment and inclusion of 'administrative chief judges' on the court's executive committee, which assumed a central role in managing the court's business once its size had grown from 13 to almost 30 judges.<sup>91</sup> Notably, from 1981, the committee was authorised by the judges to make autonomous decisions on *all* matters that were deemed by the committee itself to be of insufficient importance to require action by all of the judges.<sup>92</sup> Thus it can be said that the executive committee of the Ninth Circuit Court of Appeal was an early precursor to a board of executive directors, because it effectively removed the policy-making and management aspects of the court's business from the council of judges in practically all cases. At the same time, the inclusion of the administrative chief judges demonstrated a desire to achieve more functional division of responsibilities on the committee itself, based on the judges' operational responsibilities (rather than their seniority, regional representation or policy-making expertise alone), which corresponds with the operational *foci* of boards of executive directors. In other words, the executive committee effectively integrated its policy making function with operational management to the extent that the Chief Judge and the

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<sup>89</sup> Diana Bryant, 'The Autonomous Model - Not All Beer and Skittles' (Paper presented at the The Judicial Conference of Australia Colloquium, Hyatt Hotel, Canberra, 6-8 October 2006) 5. The Chief Justice states that she is guided in her policy-making role by a Policy Advisory Committee and also the twice-yearly plenary meetings of judges.

<sup>90</sup> Hill, above n 24, 83.

<sup>91</sup> Church Jr, above n 31, 244.

<sup>92</sup> Ibid 243.

Administrative Chief Judges were also actively involved in the operational aspects of court administration.<sup>93</sup>

In Australia, Queensland was the first jurisdiction to have formally vested sweeping administrative powers in the administrative judges. The District Court and Supreme Court legislation gives the administrative judges the powers to do 'all things necessary or convenient to be done' for the administration of the courts and makes them responsible to the Chief Judges for ensuring the 'orderly and expeditious exercise of the jurisdiction' of those courts.<sup>94</sup> These powers were inserted in the legislation more recently in order to clarify that the administrative judge is 'senior to all other judges of the court apart from the Chief Judge.'<sup>95</sup>

The Queensland example is significant because the legislation clearly separates the judges' administrative position from their judicial office and therefore creates a dedicated judicial executive function solely responsible for court administration. Indeed, according to the Parliamentary debates leading to the appointment of the administrative judges, the intended role for these judicial officers was to ensure that 'modern case flow management techniques and other needed reforms' could be put into place to improve the efficiency and responsiveness' of the court.<sup>96</sup>

The Queensland model is also significant in that it keeps the responsibility for court administration away from the councils of judges. However, it should be kept in mind that the functions conferred on the Chief Judges and administrative judges in Queensland are confined to matters of judicial administration, because court operations in that jurisdiction are separately managed by the executive arm of government. Therefore, although the functions and powers of the administrative judges in Queensland appear to closely resemble a corporate board of judicial executives, in reality their contribution to wider court administration policy and strategic planning of court operations remains limited. Nevertheless, the Queensland legislation represents a good example of a judicial management framework where the administrative duties, functions and powers of the judicial executives are transparent, functional and well-defined.

### B. The Court Management Board in the Netherlands

In the EU countries, as foreshadowed, the most significant example of the corporate board design has been introduced in the Netherlands, where the internal governance architecture of the courts is centred around their internal legal-administrative divisions ('sectors'), such as

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<sup>93</sup> Ibid 245. However, Church also notes that the Ninth Circuit Court of Appeal Executive Committee included non-executive judges who served as representatives from the geographical regions and circuits.

<sup>94</sup> S. 51 of the *Supreme Court of Queensland Act 1991* (Qld) and s 28F of the *District Court of Queensland Act 1967* (Qld).

<sup>95</sup> *Justice and Other Information Disclosure Bill 2008 (Qld)*, Explanatory Memorandum, 11-12.

<sup>96</sup> See Queensland Legislative Assembly 10 October 1991, Parliamentary debates, 1713.

the administrative, criminal and civil law divisions that are also commonly found in most Australian state courts. In 2002, the Dutch legislation established an executive board for each court other than the Supreme Court of the Netherlands. According to the *Judiciary (Organisation) Act*, all judges and administrative officers are formally subordinated to the decisions of the executive board.<sup>97</sup> In order to ensure individual judicial independence, the governing board is not permitted to interfere in any procedural aspects, substantive assessment or the decision in a specific case or category of cases.<sup>98</sup>

One of the striking features of the Dutch model of court governance is that it fully separates the court management from the judicial 'equity holders,' something that even the early American court reformers had never sought to accomplish. As a result, the councils of judges in the Netherlands no longer have a formal say in the court operations, although they continue to perform an advisory role to the governing board.<sup>99</sup> The composition of the governing board itself has been faithfully modelled upon a corporate board of executive directors. Under the *Judiciary (Organisation) Act*, the governing board consists of a chairperson (the court president), up to four divisional chief judges, and one non-judicial member who is the CEO.<sup>100</sup> The governing board is under a legal obligation to establish within the court up to four organisational divisions,<sup>101</sup> with each division having its own judicial, administrative and even financial responsibilities.<sup>102</sup> A further notable feature of the Dutch governing board is that all of the divisional chief judges, including the court president, are appointed by Royal Decree for a 6-year term.<sup>103</sup> The idea behind this requirement is that the judicial representatives on the board should be chosen based on their administrative competence, rather than their seniority or position in the judicial hierarchy, which has been identified in the literature as one of the key principles of good judicial governance.<sup>104</sup>

The management of each court division is allocated to a divisional team, which consists of the divisional chief judge and a professional court administrator. The divisional judge chairs the divisional meetings and is responsible for the day-to-day management of the division, while the coordinator manages the administrative staff in consultation with the divisional judge.<sup>105</sup> This arrangement seeks to ensure that each

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<sup>97</sup> S.24 and 25 of the *Judiciary (Organisation) Act 1827 (Netherlands)*.

<sup>98</sup> S.23(2) of the *Judiciary (Organisation) Act*.

<sup>99</sup> Bunjevack, above n 60, 220-1.

<sup>100</sup> S.15 of the *Judiciary (Organisation) Act*. The president represents the court.

<sup>101</sup> S.20(1) of the *Judiciary (Organisation) Act*.

<sup>102</sup> The governing board allocates funding from the court's budget to each of the divisions.

<sup>103</sup> S.15 of the *Judiciary (Organisation) Act*. The members of the management board may be reappointed. See also s. 16. The judge-managers are entitled to an allowance in addition to their salary for the work performed in their managerial capacity.

<sup>104</sup> See National Center for State Courts, *Principles for Judicial Administration* (NCSC, 2012), above n 50, 4. See also Durham Christine and Daniel Becker, above n 50, 5.

<sup>105</sup> S. 21 of the *Judiciary (Organisation) Act*.

division is managed more independently and efficiently, by integrating the judicial and administrative powers in the court divisions, without the need to refer day-to-day operational matters to the board itself.<sup>106</sup> The divisional planning is coordinated between the management board and the divisions based on a quarterly cycle.

Because the divisional judges are also members of the governing board of the court, the framework provides balance and collegiality at the policy-making level. At the same time, the policy-making function and management have been integrated, by allowing the divisional judges to actively participate in policy formulation at the board level. Overall, however, the policy-making function rests solely with the management board, while the responsibility for operational management has been delegated to the organisational units that are most familiar with the judicial work in the divisions themselves.

Significantly, the Dutch legislation also takes into account the general principles of internal administrative transparency that were identified in Part 2. For example, the Act prescribes the governing board's duties and responsibilities in some detail, while also imposing on the board further administrative requirements that must be addressed in internal court 'regulations'.<sup>107</sup> Thus according to s 23 of the *Judiciary (Organisation) Act*, the board is responsible for the budgeting, planning and control cycle, as well as the overall functioning of the courts, including personnel matters, organisational procedures and information and management systems.<sup>108</sup> Furthermore, the governing board is required to create transparent court regulations that govern its procedure, decision-making, division of responsibilities, organisational structure, complaints procedure, delegation, replacement of members in the event of illness and the jurisdictional allocation of cases between the divisions.<sup>109</sup>

Based on the discussion above, it appears that the Dutch board model meets the key requirements of modern corporate board design that have been identified in this paper. One of the unique achievements of the Dutch model is that it fully separates the court management from the judicial 'principals', which is regarded in corporate governance theory as the key to achieving more effective and efficient management of large organisations. Similarly, the establishment of the divisional teams, which are centred upon the courts' existing legal-administrative divisions, serves to promote better integration of the operational and policy-making functions at the board, by fostering greater involvement of the divisional chief judges in the divisional administration and policy-making at the board. An independent review of the Dutch courts concluded that the divisional arrangements, in particular, had been effectively implemented in that they provided a 'solution to the aforementioned lack of clarity regarding the division of tasks, powers

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<sup>106</sup> Gar Yein Ng, *Quality of Judicial Organisation and Checks and Balances* (PhD Thesis, Utrecht University, 2007) 110.

<sup>107</sup> S. 19 of the *Judiciary (Organisation) Act*.

<sup>108</sup> S.23 of the *Judiciary (Organisation) Act*.

<sup>109</sup> S.19 of the *Judiciary (Organisation) Act*.

and responsibilities' which had previously impeded court administration in the executive model.<sup>110</sup>

#### CONCLUSION

This paper has sought to identify a number of principles of good corporate governance that would be useful in considering the structure and powers of the proposed court management board. The experiences from the USA and Europe demonstrate that the process of modern corporate transformation of the courts is evolving from mere adaptation of corporate management practices imposed upon existing court structures, towards the establishment of modern court governance frameworks that are modelled on their corporate world equivalents.

The article proposes the establishment of a small board of executive judges, which would structurally separate the court management from the councils of judges. That organisational framework would offer an effective answer to the problems of misalignment of the administrative responsibilities in many Australian courts. It would also provide a functional collegiate forum for policy-making, thus addressing the problems associated with the Chief Justices' administrative dominance in the Australian federal courts.

The proposed model is theoretically underpinned by the 'stewardship' theory of corporate governance, which sees benefits in integrating the policy-making and operational functions in a small board of executive directors, in situations where the interests of the board members (judicial 'stewards') appear to be fundamentally aligned with those of the principals (councils of judges).

The experiences from other jurisdictions show that the vesting of formal legislative powers in the chief and administrative judges is the key to resolving any problems of administrative ambiguity. The courts legislation in the Netherlands, in particular, provides an excellent example of a transparent normative framework with clearly identified structures, duties and responsibilities of the management board and the divisional teams. This should be contrasted with the existing legislation in Victoria, which is deficient in that it does not facilitate or clarify the functions and powers of the internal administrative structures either in relation to individual judges, or in relation to the court administration as a whole.

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<sup>110</sup> J. Franssen, Mein A and Verberk S, *Gerechtsbesturen, Integral Management En Md-Beleid* (B&A Groep, WODC, 2006) 2-4. ("The Functioning of Court Administrations, Integral Management and Management Development Policy").

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